CHAPTER 6

OBLIGATING APPROPRIATED FUNDS

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I. INTRODUCTION. Following this block of instruction, students will understand:

A. The importance of accounting for commitments and obligations;

B. Amounts to commit and obligate for various types of contract actions.

C. Obligation rules for bid protests, contract changes, contract terminations, litigation, and miscellaneous other circumstances.

II. REFERENCES.

A. 31 U.S.C. § 1501, Documentary evidence requirement for Government obligations.

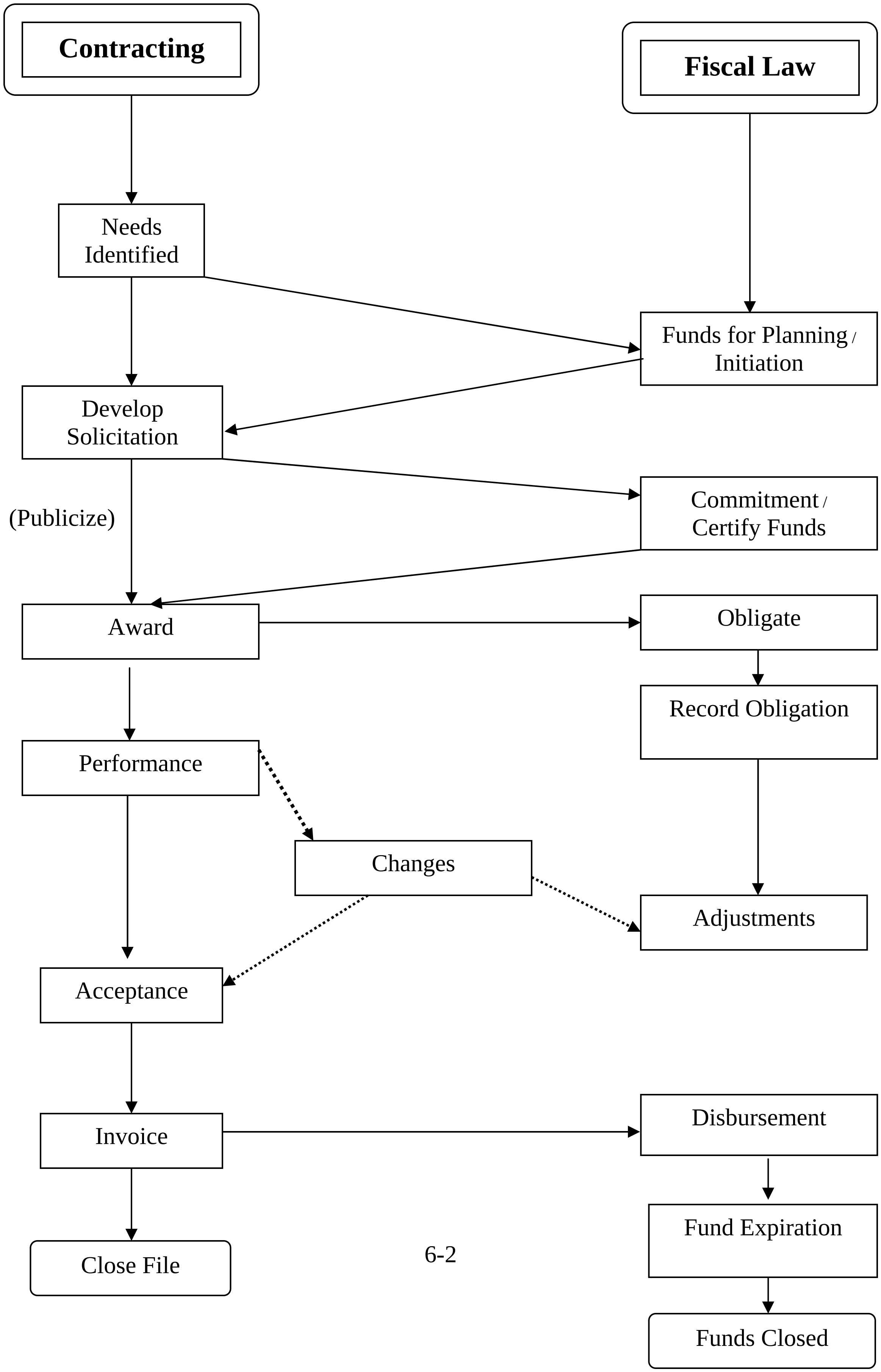
B. Office of Management and Budget Circular A-11, Section 20.5, (2002) [hereinafter OMB Cir. A-11].

C. General Accounting Office, Office of General Counsel, Principles of Federal Appropriations Law, ch. 7, Obligation of Appropriations (2d ed. 1992).

D. DOD Directive 7200.1, Administrative Control of Appropriations (May 1995); DOD Instruction 7000.14, DOD Financial Management Policy and Procedures (Nov. 1992); DOD 7000.14-R, DOD Financial Management Regulation, Vol. 3, Budget Execution – Availability and Use of Budgetary Resources (Jun. 2005) [hereinafter DOD FMR].

E. Defense Finance and Accounting Service--Indianapolis Regulation 37-1, Finance and Accounting Policy Implementation, ch. 7 (Commitments) (Oct. 2001) & ch. 8 (Obligation Management) (Mar. 2004) [hereinafter DFAS-IN 37-1] (*available at* https://dfas4dod.dfas.mil/library).

CONTRACTING PROCESS AND FISCAL PROCESS



F. Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Procedures For Administrative Control of Appropriations and Funds Made Available to the Department of the Air Force (Sep. 1999) [hereinafter DFAS-DE, Procedures for Administrative Control]; Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Commitments (Oct. 2003) [hereinafter DFAS-DE, Commitments]; and Defense Finance and Accounting Service--Denver/Air Force Interim Guidance, Accounting For Obligations (Nov. 2004) [hereinafter DFAS-DE, Obligations]. All three can be accessed at https://dfas4dod.dfas.mil/library.

III. ACCOUNTING FOR COMMITMENTS.

A. Definitions.

1. Certifying Officer. An individual authorized to certify the availability of funds on any documents or vouchers submitted for payment and/or indicates payment is proper. (S)he is responsible for the correctness of the facts and computations, and the legality of payment. DFAS-IN 37-1, Glossary.

2. Fund Managers. Individuals who manage financial resources to include major activity, sub-activity directors, and their representatives who are delegated fund certification responsibility. DFAS-IN 37-1, Glossary.

3. Certification of Fund Availability. A certification by a funds-certifying official that funds are available in the proper subdivision of funds to cover the obligation to be incurred. This certification authorizes the obligating official to make the desired obligation. DFAS-DE, Procedures for Administrative Control, Definitions, p. X.

4. Commitment. An administrative reservation of funds based upon firm procurement requests, orders, directives, and equivalent instruments. An obligation equal to or less than the commitment may be incurred without further approval of a certifying official. DOD FMR, vol. 3, ch. 15, para. 150202A.

5. Initiation. An administrative reservation of funds based on procurement directives, requests, or equivalent instruments that authorize preliminary negotiations, but require that funds be certified by the official responsible for the administrative control of funds before incurrence of the obligation. Initiations help keep precommitment actions, such as approved procurement programs and procurement directives, within the available subdivision of funds. Synonyms may be used for this term. DOD FMR, vol. 1, Definitions.

B. Rules Governing Commitments.

1. When used. DOD activities must use commitment accounting procedures for military construction; research, development, test, and evaluation; and procurement appropriations. Commitments need not be recorded for small purchases if, in the aggregate, they are insignificant in the management of funds. Commitment accounting is not required for other accounts, but may be used if cost effective. DOD FMR, vol. 3, ch. 15, para. 150202A5.

a. Army. The Army requires certification of fund availability for unexpired and expired appropriations. DFAS-IN 37-1, ch. 3, para. 031701.

b. Air Force. Commitment accounting is prescribed for all Air Force appropriations, apportioned stock fund divisions, management funds, contract authorizations, administrative and direct cite foreign military sales (FMS) trust fund, and special fund appropriations. DFAS-DE, Accounting for Commitments, p. 3-1.

2. Who. The official responsible for administrative control of funds for the affected subdivision of the appropriation shall sign the commitment document.[1] DOD FMR, vol. 3, ch. 15, para. 150202A1.

a. Army. Serviced activities or fund managers will maintain commitment registers, and are responsible for processing,

[1] A commitment document is an order form used to ensure that funds are available prior to incurring an obligation. Commitments in the Army may be accomplished using DA Form 3953 (Purchase Request and Commitment) or similar documents having the effect of a firm order or authorization to enter into an obligation. DFAS-IN 37-1, ch. 7, para. 070601. The Air Force uses AF Form 9 as a fund cite authorization document. See Appendices C and D to view these forms. A number of organizations are using *PRweb*, a paperless Purchase Request and Commitment process that is part of the AcquiLine suite of acquisition software. Information about AcquiLine can be found at American Management System's (AMS) (the commercial vendor's) website: http://acquiline.ams.com/.

recording, and performing the oversight function for commitment accounting. Fund control responsibilities may be delegated, in writing, to the Director of Resource Management (DRM)/ Comptroller or other appropriate official(s) IAW regulation. Designated officials will perform commitment accounting as required in Chapter 7. DFAS-IN 37-1, paras. 0703, 030209.

b. Air Force. Financial Service Office(r) will certify fund availability before obligations are authorized or incurred against funding documents. DFAS-DE, Procedures for Administrative Control, p. 1-7.

3. Why. Commitment accounting helps ensure that the subsequent entry of an undelivered order or accrued expenditure will not exceed available funds. DOD FMR, vol. 3, ch. 15, para. 150202A1. Issuing a commitment authorizing obligations in excess of an appropriation or formal subdivision of funds could result in an antideficiency violation of 31 U.S.C. § 1341 or 31 U.S.C. § 1517.

4. What. Activities may commit funds only to acquire goods, supplies, and services that meet the bona-fide needs of the period for which Congress appropriated funds, or to replace stock used during that period. DFAS-IN 37-1, para. 070501.

5. Agencies cancel outstanding commitments when the committed funds expire for obligation. DOD FMR, vol. 3, ch. 15, para. 150202A6.

C. Determining the Amounts of Commitments. Agencies commit funds according to the following rules:

1. General. Record as a commitment the cost estimate set forth in the commitment document. DOD FMR, vol. 3, ch. 8, para. 080201.

2. Contingent liabilities. As a budgetary term, a contingent liability represents a variable that cannot be recorded as a valid obligation. DOD FMR, vol. 1, Definitions. Commit an amount that is conservatively estimated to be sufficient to cover the additional obligations that probably will materialize, based upon judgment and experience. Allowances may be made for the possibilities of downward price revisions and quantity underruns. The contingent liability shall be supported by sufficient detail

to facilitate audit. DOD FMR, vol. 3, ch. 8, para. 080202A. Examples of contract actions requiring a contingent liability commitment include:

a. Fixed-price contracts with price escalation, price redetermination, or incentive clauses.

b. Contracts authorizing variations in quantities to be delivered.

c. Contracts where allowable interest may become payable on a contractor claim supported by a written appeal pursuant to the "Disputes" clause of the contract.

d. Cost-reimbursable and time-and-material contracts.

(1) Commitment amounts relating to cost-plus-fixed-fee, cost-sharing, cost-plus-incentive-fee, time-and-material, and labor-hour contracts should include the fixed-fee in the cost-plus-fixed-fee and the target fee in the cost-plus-incentive-fee. DFAS-DE Accounting for Commitments, p. 4-4.

(2) Cost-plus-award-fee contracts. Commit the estimated cost, the base fee, and an estimated amount based on judgment and experience for the award fee. DFAS-DE Accounting for Commitments, p. 4-4.

3. Letter contracts and letters of intent. Commit funds to cover the difference between the maximum legal liability of the government under the interim agreement and the maximum estimated cost of the definitized contract. An exception is a letter providing that award of the definitive contract is dependent upon a congressional appropriation, in which case no funds are available for commitment. DOD FMR, vol. 3, ch. 8, para. 080202B.

4. Open-end contracts and option agreements. Commit funds only when the amount estimated is reasonably firm. DOD FMR, vol. 3, ch.8, para. 080202C.

5. Contract Amendments or Engineering Changes. Commit an amount based on a stated cost limitation. DOD FMR, vol. 3, ch. 8, para. 080202D.

6. Intra-Governmental Requisitions and Orders (such as a DD Form 448, "Military Interdepartmental Purchase Request"). Commit the amount of the order until validly obligated under the guidelines of the DOD FMR. DOD FMR, vol. 3, ch. 8, para. 080202E.

7. Imprest Funds.[2] Record as a commitment before funds are advanced to the imprest fund cashier. DFAS-DE, Accounting For Commitments, p. 4-2; see also Appropriations Accounting for Imprest Fund Advances Issued to Cashiers, B-240238, 70 Comp. Gen. 481, (May 8, 1991).

8. Commit no funds for--

   a. Potential termination charges on multi-year contracts that provide for cancellation charges if the government must cancel the contract for reasons other than contractor liability. DOD FMR, para. 080202F.

   b. Blanket Purchase Agreements. DFAS-DE, Accounting For Commitments, p. 4-2.

D. Advanced Acquisition Planning for the Next FY Funding. In some instances, qualified statements are used to provide authority to contracting officers to proceed with advance contracting actions before actual receipt of funds. DFAS-DE, Accounting For Commitments, p. 3-4.

1. Air Force. Instead of a certification of fund availability, the following statement must be placed upon the request for purchase and signed by budget office personnel at the time approval is obtained: "This requirement is included or provided for in the installation or major command financial plan for FY___. The accounting classification shall be ___." See DFAS-DE 7010.2-R, para. 9-18e.

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[2] An imprest fund is a "cash fund of a fixed amount established by an advance of funds, without charge to an appropriation, from an agency finance or disbursing officer to a duly appointed cashier, for disbursement as needed from time to time in making payment in cash for relatively small amounts." FAR 13.001. For DOD activities, imprest funds may be used **only** for classified operations or contingency, humanitarian or peacekeeping operations overseas. DOD 7000.14-R, vol. 5, ch. 2, para. 020902 and DFAR 213.305(d).

2. Army. The comptroller or designee shall sign the following statement on the purchase request: "This requirement is included or provided for in the financial plan for FY___. The accounting classification will be ___. This statement is not a commitment of funds." See AFARS 1.602-2.

IV. OBLIGATION OF FUNDS.

A. Definitions.

1. Obligation. An act which creates a legal liability on the part of the Government for the payment of appropriated funds for goods and services ordered or received. GAO Redbook, Vol. II, page 7-3 to 7-4.

   a. Examples: Amounts of orders placed, contracts awarded, services received, and similar transactions that will require payments during the same or a future period. The legal requirement for recording obligations is 31 U.S.C. § 1501. OMB Cir. No. A-11, para. 20.5. All obligations require a standard document number (SDN). DFAS-IN 37-1, para. 080102. SDN formats are in DFAS Manual 37-100-FY.

   b. The obligation takes place when the definite commitment is made, even though the actual payment may not take place until the following fiscal year. GAO Redbook, Vol. II, page 7-4.

2. Current Appropriation. An appropriation whose availability for new obligations has not expired under the terms of the applicable appropriations act.

3. Expired Appropriation. An appropriation whose availability for new obligations has expired, but which retains its fiscal identity and is available for recording, adjusting, and liquidating obligations properly chargeable to that appropriation. 31 U.S.C. § 1553(a).

4. Closed Appropriation. An appropriation that is no longer available for any purpose. An appropriation becomes "closed" five years after the end of its period of availability as defined by the applicable appropriations act. 31 U.S.C. § 1552(a).

B. General Rules.

1. An obligation must be definite and certain. GAO Redbook, Vol. II, page 7-3.

2. Obligate funds only for the purposes for which they were appropriated. 31 U.S.C. § 1301(a).

3. Obligate funds only to satisfy the bona fide needs of the current fiscal year. 31 U.S.C. § 1502(a); DOD FMR, vol. 3, ch. 8, para. 080303A.

4. Obligate funds only if there is a genuine intent to allow the contractor to start work promptly and to proceed without unnecessary delay. DOD FMR, vol. 3, ch. 8, para. 080303B.

5. Generally, obligate current funds when the government incurs an obligation (incurs a liability). DOD FMR, vol. 3, ch. 8, para. 080302. Some exceptions, discussed in this outline and in the "Time" outline, include: Protests (see section VIII A of this outline); Replacement contracts for contracts that have been terminated for default (see section VI of this outline) and "in-scope" contract changes (see section VI B of this outline).

6. Do not obligate funds in excess of (or in advance of) an appropriation, or in excess of an apportionment or a formal subdivision of funds. 31 U.S.C. §§ 1341, 1517.

7. Subject to the Availability of Funds. Execute contracts "subject to the availability of funds" (SAF) if administrative lead-time requires contract award prior to the receipt of funds to ensure timely delivery of the goods or services. If a SAF clause is used, the Government shall not accept supplies or services until the contracting officer has given the contractor written notice that funds are available. FAR 32.703-2.

   a. FAR 52.232-18, Availability of Funds, may be used only for operation and maintenance and continuing services (e.g., rentals, utilities, and supply items not financed by stock funds) (1) necessary for normal operations and (2) for which Congress previously had consistently appropriated funds, unless specific statutory authority exists permitting applicability to other requirements. FAR 32.703-2 (a).

b. FAR 52.232-19, Availability of Funds for the Next Fiscal Year, is used for one-year indefinite-quantity or requirements contracts for services that are funded by annual appropriations that extend beyond the fiscal year in which they begin, provided any specified minimum quantities are certain to be ordered in the initial fiscal year. FAR 32.703-2 (b).

V. AMOUNTS TO OBLIGATE.

A. General.

1. Recording obligations.

a. Obtain documentary evidence of the transaction before recording an obligation. 31 U.S.C. § 1501; DOD FMR, vol. 3, ch.8, para. 080302; DFAS-DE 7000-4, para. 3; DFAS-IN 37-1, chapter 8.

b. Contracts, purchase orders, rental agreements, travel orders, bills of lading, civilian payrolls, and interdepartmental requisitions are common contractual documents supporting obligations. DFAS-IN 37-1, chapter 8.

2. Generally, the type of contract involved determines the specific rules governing the amount of an obligation and when to record it.

B. Contract Types.

1. Firm-Fixed Price Contracts. FAR 16.202.

a. <u>Description</u>. Provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract.

b. <u>Amount to Obligate</u>. Record total amount stated in the contract. DOD FMR, vol. 3, ch. 8, para. 080501.

2. Fixed-Price contracts with escalation, price redeterminations, and incentive provisions. DOD FMR, vol. 3, ch.8, para. 080502.

a. Fixed-Price Contract with Economic Price Adjustment (FP w/EPA). FAR 16.203.

(1) The EPA clause, FAR 52.216-2, provides that the government assumes a portion of the cost risk of certain unforeseeable price fluctuations, such as material or wage increases. The EPA provision permits contractors to eliminate contingencies for these potential costs.

(2) The contract price will be adjusted later if the contingencies occur.

b. Fixed-Price Contracts with Price Redetermination (FP-R). FAR 16.205 and 16.206.

(1) Prospective. Price is fixed for initial quantities, but is adjusted periodically for future quantities based upon the contractor's cost experience. This type is useful on initial production contracts.

(2) Retroactive. Price for work already performed is subject to redetermination based upon the contractor's actual cost experience. This type of contract is useful on small R&D contracts and other contracts where unresolved disagreements over cost accounting issues may affect price significantly.

c. Fixed-Price-Incentive Contract (FPI). FAR 16.403.

(1) A FPI contract provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of the total final negotiated cost to the total target cost. The final price is subject to a price ceiling, negotiated at the outset.

(2) The contractor bears all costs above the fixed ceiling price.

d. Fixed-Price-Award-Fee Contracts. FAR 16.404.

(1) Contractor receives a negotiated fixed price (which includes normal profit), with an opportunity to receive additional award fee based upon the quality of its performance.

(2) Award-fee provisions may be used when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively.

e. <u>Amount to Obligate</u>. Obligate the fixed price stated in the contract, or the target or billing price in the case of a contract with an incentive clause. Subsequently, adjust to a “best-cost estimate” whenever it is determined that the actual cost of the contract will differ from the original target. DOD FMR, vol. 3, ch.8, para. 080502.

3. Cost-Reimbursement Contracts. FAR Subpart 16.3.

a. <u>Description</u>. These contract types provide for payment of allowable incurred costs to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed–except at its own risk—without the approval of the contracting officer. FAR 16.301-1.

b. <u>Cost ceilings</u>. Ceilings are imposed through the Limitation of Cost clause, FAR 52.232-20, or the Limitation of Funds clause, FAR 52.232-22. The contractor may not recover costs above the ceiling unless the contracting officer authorizes the contractor to exceed the ceiling. <u>RMI, Inc. v. United States</u>, 800 F.2d 246 (Fed. Cir. 1986).

c. <u>Fee</u>. In Government contracting, fee is a term of art for the profit the Government agrees to pay on some cost-reimbursement contracts.

d. Types of Cost-Reimbursement Contracts.

(1) Cost-Plus-Fixed-Fee (CPFF) Contract. FAR 16.306.

(a) The contract price is the contractor's allowable costs, plus a fixed fee, which is negotiated and set prior to award.

(b) Obligate the full amount of the contract (i.e. total estimated costs), including the fixed fee. DFAS-IN 37-1, Table 8-1.

(2) Cost-Plus-Incentive-Fee Contract (CPIF). FAR 16.304, FAR 16.405-1.

(a) This type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula.

(b) Obligate the total estimated payment, including the target fee. DOD FMR, vol. 3, ch. 8, para. 080503.

(3) Cost-Plus-Award-Fee (CPAF) Contract. FAR 16.305 and 16.405-2.

(a) The contractor receives its costs; a base fee[3] that is fixed at award; and, possibly, an additional award fee based upon the quality of the contractor's performance.

(b) Award fee is determined unilaterally by the contracting officer or Award Fee Determining Official.

[3] For DOD contracts, base fees are limited to 3% of the estimated cost at time of award. DFARS 216.405-2(c)(ii)(2)(b).

(c) Obligate the total estimated payment, including the base fee. Do not include the award amount. Obligate award fee when determined that award will be paid. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(4) Cost Contract. FAR 16.302.

(a) The contractor receives its allowable costs but no fee.

(b) Obligate total estimated payment of the contract. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, Table 8-1.

(5) Time-and-Materials (T&M), FAR 16.601, and Labor-Hour (L-H) Contracts, FAR 16.602.

(a) T&M contracts and LH contracts are used when it is impossible at the outset to estimate accurately the extent or duration of the work. The work being acquired is defined as a specified number of hours effort by an individual of a certain skill level.

(b) The contract is priced at a specified firm-fixed-price per labor hour for each skill level. In a T&M contract, materials are priced at cost plus material overhead.

(c) Amount to obligate. Obligate the minimum liability exclusive of permitted variations. Obligate additional funds for each delivery order when the order is placed. DOD FMR, vol. 3, ch. 8, para. 080503; DFAS-IN 37-1, tbl. 8-1.

4. Indefinite Delivery Contracts.

a. Variable Quantity Contracts.

(1) Indefinite-Quantity/Indefinite-Delivery Contracts (also called Minimum Quantity). FAR 16.504.

(a) The government must buy the minimum quantity, but may purchase up to the maximum quantity. The government issues delivery orders as needs arise.

(b) Amount to obligate. Obligate the amount of the stated minimum quantity at the time of contract award. Once the stated minimum is ordered, obligate funds for each additional order at the time the order is issued. DOD FMR, vol. 3, ch. 8, para. 080504; DFAS-IN 37-1, tbl. 8-1;

(2) Indefinite delivery-definite quantity contracts. FAR 16.502.

(a) The quantity and price are fixed. The government issues delivery orders to specify the delivery date and location.

(b) Amount to obligate. Obligate the full amount of the definite quantity (for the quantity required in the current year) at the time of contract award. DFAS-IN 37-1, tbl. 8-1.

(3) Requirements Contracts. FAR 16.503.

(a) The government fills all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.

(b) Amount to obligate. Obligate no funds at contract award. Record each order, when issued, as a separate obligation. DFAS-IN 37-1, tbl. 8-1.

5. Letter Contracts or Letters of Intent.

   a. Defined. Letter contracts are used to expedite performance in exigent or emergency circumstances.

   b. Definitization. The parties must reduce the contract terms to writing within 180 days after issuance. FAR 16.603-2c; DFARS 217.7404-3. Until the contract terms are definitized, the government may not pay the contractor more than 50% of the NTE price. 10 U.S.C. § 2326; FAR 16.603-2(d).

   c. Amount to obligate. Obligate current funds in the amount of the maximum liability authorized. When the contract is definitized, adjust the obligation to equal the final amount. In adjusting the balance, use funds currently available for obligation. DOD FMR, vol. 3, ch. 8, para. 080507; DFAS-IN 37-1, tbl. 8-1; Obligating Letter Contracts, B-197274, Sept. 23, 1983, 84-1 CPD ¶ 90.

6. Purchase Orders.

   a. A purchase order creates an obligation when issued in the amount stated, if the purchase order represents acceptance of a binding written offer of a vendor to sell specific goods or furnish specific services at a specific price, or the purchase order was prepared and issued in accordance with small purchase or other simplified acquisition procedures. DOD FMR, vol. 3, ch. 8, para. 080510A.

   b. A purchase order requiring acceptance by the vendor before a firm commitment is reached must be recorded as an obligation in the amount specified in the order at the time of acceptance. If written acceptance is not received, delivery under the purchase order is evidence of acceptance to the extent of delivery. DOD FMR, vol. 3, ch. 8, para. 080510B.

7. Service Contracts.

   a. Severable Services. Absent a statutory exception, severable services are the *bona fide* need of the fiscal year in which performed. Thus, agencies must fund service contracts with dollars available for obligation on the date the contractor performs the services. Matter of Incremental Funding of Multiyear Contracts, B-241415, 71 Comp. Gen. 428 (1992); EPA Level of Effort Contracts, B-214597, December 24, 1985, 65 Comp. Gen. 154, 86-1 CPD ¶ 216; Matter of Funding of Air Force Cost Plus Fixed Fee Level of Effort Contract, B-277165 (2000).

b. Statutory exception to severable service bona fide needs rule: DOD agencies may obligate funds current at the time of award to finance any severable service contract with a period of performance that does not exceed one year. See 10 U.S.C. § 2410a (this authority also covers the Coast Guard). Similar authority exists for non-DOD agencies. See 41 U.S.C. § 253*l*. According to DFAS, "Fund holders may obligate funds current when a severable service contract is signed for the amount of the contract provided the contract does not exceed 12 months. Fund holders may also split the obligation between fiscal years that the contract covers provided the contract does not exceed 12 months. Severable service contracts that exceed 12 months will be funded by appropriations of the fiscal years in which the services are rendered." DFAS-IN Reg. 37-1, para. 080603(A).

c. Nonseverable services. If the services produce a single or unified outcome, product, or report, the services are nonseverable. If so, the government must fund the entire effort with dollars available for obligation at the time the contract is awarded, and the contract performance may cross fiscal years. DFAS-IN 37-1, tbl. 8-1; Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders, B-240264, 73 Comp. Gen. 77 (1994); Proper Appropriation to Charge Expenses Relating to Nonseverable Training Course, B-238940, 70 Comp. Gen. 296 (1991); Proper Fiscal Year Appropriation to Charge for Contracts and Contract Increases, B-219829, 65 Comp. Gen. 741 (1986).

8. Options.

a. Defined. An option is an offer that is irrevocable for a fixed period. An option gives the government the unilateral right, for a specified time, to order additional supplies or services, or to extend the term of the contract, at a specified price. FAR 2.101.

b. Amount to Obligate. Obligate funds for each option period after funds become available. Obligations must be consistent with all normal limitations on the obligation of appropriated funds, e.g., bona fide needs rule, period of availability, and type of funds.

c. For severable service contracts, option years are treated as new contracts. Therefore, when the severable service contract has renewal options, obligate funds for the basic period and any penalty charges for failure to exercise options. DFAS-IN 37-1, ch. 8, para. 080603(B).

9. Rental Agreements and Leases of Real or Personal Property. Generally, obligate for one month at a time throughout the term of the rental agreement. Determine the amount of the obligation by analyzing the government's rights to terminate the rental agreement or lease. DOD FMR, vol. 3, ch. 8, para. 0806.

a. If the government may terminate a rental agreement without notice and without obligation for any termination costs, obligate the monthly amount of the rent on a monthly basis. DOD FMR, vol. 3, ch. 8, para. 080602.

b. If the government may terminate a rental agreement without cost upon giving a specified number of days notice, obligate the monthly amount of the rent. Additionally, obligate for the number of days notice the government is required to give. DOD FMR, vol. 3, ch. 8, para. 080603.

c. If the rental agreement provides for a specified payment in the event of termination, obligate the monthly rental amount plus the amount of the termination payment. DOD FMR, vol. 3, ch. 8, para. 080604.

d. If a domestic or foreign rental agreement has no termination provision and is financed with an annual appropriation, obligate the full amount of the rental agreement (up to 12 months), even if the rental agreement extends into the next fiscal year. DOD FMR, vol. 3, ch. 8, para. 080605.

e. The government may enter into leases of structures and real property in foreign countries for periods up to 5 years (10 years for military family housing). 10 U.S.C. § 2675. Obligations for such leases may not exceed the period of availability of the funds with which the lease is financed. A lease for more than 12 months, or one which crosses fiscal years, requires obligation of funds in the full amount of the lease, limited by the period of availability of the funds being used, i.e., obligation of funds for the total number of months remaining in the period of availability is required. Obligate for the months after the end of the period of availability in subsequent fiscal years. DOD FMR, vol. 3, ch. 8, para. 080605.

10. Reimbursable Orders Placed With DOD Components or Other U.S. Government Agencies.

a. Reimbursable orders. The requiring agency records an obligation when the procuring agency accepts the order in writing. DOD FMR, vol. 3, ch. 8, para. 080701; DFAS-IN 37-1, tbl. 8-2.

b. Direct citation method. Record the obligation when the requiring agency is notified, in writing, that the acquiring agency's contract, project order, purchase order, etc., has been executed, or when the requiring agency receives copies of the obligating documents (contract, delivery order, etc.) from the procuring agency. DOD FMR, vol. 3, ch. 8, para. 080702. For the Army, DFAS-IN 37-1, tbl. 8-2, provides that the requiring agency may record the obligation only upon receipt of the obligating documents from the acquiring agency.

c. DFAS guidance regarding reimbursable orders and direct fund cite orders: When a direct fund cite is used, the performing activity will provide a copy of the contract or other obligating document to the ordering activity. This will provide the documentation required to record the obligation. If not using direct fund cite, the ordering activity will obligate upon receipt of the accepted DD Form 448-2. DFAS-IN 37-1, para. 081207(A)7.

d. Orders placed with DOD components under the Project Order Law (41 U.S.C. § 23), or with other U.S. governmental agencies under the Economy Act (31 U.S.C. § 1535). DOD FMR, vol. 3, ch. 8, para. 080703.

(1) Project orders. When the performing activity accepts the order in writing, obligate funds in the amount stated in the order. DOD FMR, vol. 3, ch. 8, para. 080603A; DFAS-IN 37-1, tbl. 8-2.

(2) Economy Act orders. Obligate funds when the performing activity accepts the order in writing. Adjust undelivered Economy Act orders issued against annual or multiple year appropriations downward at the end of the period of availability of the funds. DOD FMR, vol. 3, ch. 8, para. 080703B; DFAS-IN 37-1, tbl. 8-2.

e. Orders required by law to be placed with another U.S. governmental agency, such as the Federal Prison Industries (18 U.S.C. § 4124), or the Government Printing Office (44 U.S.C. § 111). Record as an obligation by the requiring agency in the amount stated in the order when the order is issued. DOD FMR, vol. 3, ch. 8, para. 080704; DFAS-IN 37-1, tbl. 8-2.

f. Improper to "bank" an agency's annual funds with a GSA account to cover future year needs. Implementation of the Library of Congress FEDLINK Revolving Fund, B-288142, Sep. 6, 2001; Continued Availability of Expired Appropriation for Additional Project Phases, B-286929, Apr. 25, 2001. In accordance with (IAW) 40 U.S.C. 1412(e), Department of Defense (DoD) activities may obtain information technology resources from GSA programs without relying on the Economy Act. The obligation is recorded at the time the activity enters into a binding written interagency agreement with GSA. New needs may not be added to an existing order and funded with expired funds unless deemed to be a within scope change to the original order. DFAS-IN 37-1, para. 080607.

11. Stock Fund Orders. Record as an obligation when the order is placed. If the item does not have a stock number, record at the time the stock fund accepts the order. DOD FMR, vol. 3, ch. 8, para. 080801.

a. Adjust obligations for undelivered stock fund orders when a change notice affecting price, quantity, or an acceptable substitution is received. DOD FMR, vol. 3, ch. 8, para. 080802A.

b. Cancel a stock fund obligation when notice is received of: (a) unacceptable substitution; (b) transfer of a stock-funded item to funding by a centrally managed procurement appropriation within a DOD component; or (c) advice that the stock fund is unable to perform under the terms of the order. DOD FMR, vol. 3, ch. 8, para. 080802A.

c. When the customer's financing appropriation expires, an undelivered order for a nonstock-numbered item for which the stock fund has not executed a procurement action (incurred an obligation) also expires. DOD FMR, vol. 3, ch. 8, para. 080803.

VI. ADJUSTING OBLIGATIONS.

A. Adjusting Obligation Records. For five years after the time an appropriation expires for incurring new obligations, both the obligated and unobligated balances of that appropriation shall be available for recording, adjusting, and liquidating obligations properly chargeable to that account. 31 U.S.C. §1553(a); DOD FMR, vol. 3, ch. 10, para. 100201A.

B. Contract Changes. A contract change is one that requires the contractor to perform additional work. Identity of the appropriate fund for obligation purposes is dependent on whether the change is "in-scope" or "out-of-scope." The contracting officer is primarily responsible for determining whether a change is within the scope of a contract. DOD FMR, vol. 3, ch. 8, para. 080304, Specific Guidelines for Determining Scope of Work Changes.

1. In-scope change. Charge the appropriation initially used to fund the contract.

a. Relation-Back Theory. The "relation-back theory" is based upon the rationale "that the Government's obligation under the subsequent price adjustment is to fulfill a bona fide need of the original fiscal year and therefore may be considered as within the obligation which was created by the original contract award." See Environmental Protection Agency - Request for Clarification, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 611, 82-2 CPD ¶ 491; See also The Honorable Andy Ireland, House of Representatives, B-245856.7, 71 Comp. Gen. 502 (1992):

> [A] contract change authorized by and enforceable under the provisions of the original contract, commonly referred to as a within-the-scope change, is considered an antecedent liability. In other words, the original contract makes the government liable for a price increase under specified conditions and the subsequent contract change makes that liability fixed and certain. Therefore, the liability relates back to the original contract and the price increase to pay the liability is charged to the appropriation initially obligated by the contract.

b. Increase of ceiling price under Cost-reimbursement contract. For an increase in ceiling price with no antecedent liability (i.e., discretionary increase), obligate funds from fiscal year cited in original contract if available, then current funds. DFAS-IN 37-1, table 8-7, note 4. <u>See</u> <u>also</u> <u>Proper Fiscal Year Appropriation to Charge for Contract and Contract Increases</u>, B-219829, 65 Comp. Gen. 741 (1986) (finding proper the use of current funds to fund increase to CPFF contract).

2. Change outside the scope of the contract. Treat as a new obligation and use funds current when the contracting officer approves the change. <u>Environmental Protection Agency-Request for Clarification</u>, B-195732, Sept. 23, 1982, 61 Comp. Gen. 609, 82-2 CPD ¶ 491.

C. Limitations on use of Expired or Current Funds to adjust obligations. 31 U.S.C. § 1553(c); DOD FMR, vol. 3, chs. 8 and 10; DFAS-IN 37-1, para. 0815.

1. <u>Expired Accounts</u>.

a. <u>Upward obligation adjustments in excess of $1 Million</u>. No upward obligation adjustment in excess of $1 Million that involves any individual action or contract shall be accomplished to expired appropriation accounts without prior submission to, and approval by, the Head of the DOD Component. The prior approval authority may be delegated, but a report must be provided annually to the Component Head. DOD FMR, vol. 3, ch. 8, para. 0813.

b. Contract change in Excess of $4 Million. Approval by the Under Secretary of Defense (Comptroller) is required when the amount of an obligation would cause the total amount of charges in any fiscal year for a single program, project, or activity to exceed $4 million and the account being used to fund the obligations is no longer available for new obligation. DOD FMR, vol. 3, ch. 10, para. 100204.

c. Contract change of $25 Million or More. The Under Secretary of Defense (Comptroller) must submit a notice of intention to make the obligation, along with the legal basis and policy reasons for obligation, to the Armed Services and Appropriations Committees of the Senate and the House. DOD FMR, vol. 3, ch. 10, para. 100205.

(1) After 30 days have elapsed following submission of the notice, the proposed obligation may be recorded unless any congressional committee notifies the USD(C) of its disapproval.

(2) DOD components are required to submit to DOD documentation that explains the circumstances, contingencies, or management practices that caused the need for the adjustment, to include letters to the appropriate congressional committees for the signature of the USD(C).

2. Current Funds otherwise chargeable to Cancelled Account. DOD FMR, vol. 3, ch. 10, para. 100201F. When a currently available appropriation is used to pay an obligation, which otherwise would have been properly chargeable both as to purpose and amount to a canceled appropriation, the total of all such payments by that current appropriation may not exceed the lesser of:

a. The unexpended balance of the canceled appropriation; or

b. The unexpired unobligated balance of the currently available appropriation; or

c. One percent of the total original amount appropriated to the current appropriation being charged.

(1) For annual accounts, the 1 percent limitation is of the annual appropriation for the applicable account—not total budgetary resources (e.g. reimbursable authority).

(2) For multi-year accounts, the 1 percent limitation applies to the total amount of the appropriation.

(3) For contract changes, charges made to currently available appropriations will have no impact on the 1 percent limitation rule. The 1 percent amount will not be decreased by the charges made to current appropriations for contract changes.

VII. RULES OF OBLIGATION FOR TERMINATED CONTRACTS.

A. Termination for Convenience.

1. When a contract is terminated for the convenience of the government, the contractor is entitled to a settlement that typically includes payment for costs incurred, a reasonable profit (unless the contractor is in a loss status at time of termination), and reasonable costs of settlement of the terminated work. See e.g., FAR 52.249-1, Termination for the Convenience of the Government (Fixed-Price).

2. The contracting officer is responsible for deobligating all funds in excess of the estimated termination settlement costs. FAR 49.101(f); DOD FMR, vol. 3, ch. 8, para. 080512.

3. If a contract is terminated for convenience pursuant to a court order or determination by other competent authority (board of contract appeals, Government Accountability Office, or contracting officer) that the original award was improper, the appropriation originally cited may be used in a subsequent fiscal year to fund a replacement contract if the following criteria are met:

(a) the original contract is made in good faith;

(b) the agency has a continuing bona fide need for the goods or services involved;

(c) the replacement contract is of the same size and scope as the original contract; and

(d) the replacement contract is executed without undue delay after the original contract is terminated for convenience. See Navy, Replacement Contract, B-238548, Feb. 5, 1991, 70 Comp. Gen. 230, 91-1 CPD ¶ 117 (holding that funds are available after contracting officer's determination that original award was improper); DFAS-IN 37-1, para. 080606.

B. Termination for Default. After a contract is terminated for default, the government may still have a bona fide need for the supply or service. In such a case, the originally obligated funds remain available for obligation for a reprocurement contract, notwithstanding the expiration of the normal period of availability, if:

1. The replacement contract is awarded without undue delay after the original contract is terminated for default;

2. its purpose is to fulfill a bona fide need that has continued from the original contract; and

3. the replacement contract is awarded on the same basis and is similar substantially in scope and size as the original contract. See Funding of Replacement Contracts, B-198074, July 15, 1981, 60 Comp. Gen. 591, 81-2 CPD ¶ 33; DFAS-IN 37-1, para. 080607.

VIII. MISCELLANEOUS RULES OF OBLIGATION.

A. Bid Protests or other challenge. 31 U.S.C. § 1558; DFAS-IN 37-1, para. 080608.

1. Funds available at the time of protest or other action filed in connection with a solicitation for, proposed award of, or award of such contract, remain available for obligation for 100 days after the date on which the final ruling is made on the protest or other action.

2. A protest or other action consists of a protest filed with the Government Accountability Office, or an action commenced under administrative procedures or for a judicial remedy if:

    a. The action involves a challenge to—

        (1) a solicitation for a contract;

        (2) a proposed award for a contract;

        (3) an award of a contract; or

        (4) the eligibility of an offeror or potential offeror for a contract or of the contractor awarded the contract; and

    b. commencement of the action delays or prevents an executive agency from making an award of a contract or proceeding with a procurement. 31 U.S.C. § 1558.

3. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later. 31 U.S.C. § 1558.

    a. A request for reconsideration of a GAO protest must be made within ten days after the basis for reconsideration is known or should have been known, whichever is earlier. 4 C.F.R. § 21.14(b).

    b. The appeal of a protest decision of a district court or the Court of Federal Claims must be filed with the Court of Appeals for the Federal Circuit within 60 days after the judgment or order appealed from is entered. Fed. R. App. P. 4(a)(1)(B).

c. See also, DFAS-IN Reg. 37-1, para. 080606.

B. Ratification of Unauthorized Commitments. Charge against the funds that would have been charged had the obligation been valid from its inception. FAR 1.602-3; DFAS-IN 37-1, tbl. 8-6, para. 12; Fish & Wildlife Serv.-Fiscal Year Chargeable on Ratification of Contract, B-208730, Jan. 6, 1983, 83-1 CPD ¶ 75 (ratification relates back to the time of the initial agreement, which is when the services were needed and the work was performed).

C. Liquidated Damages. Recover the amount of liquidated damages deducted and withheld from the contractor. If the contractor objects to the assessment of liquidated damages, treat the amount as a contingent liability. Reestablish an obligation only when a formal contractor claim is "approved," i.e., sustained by government admission or by a judgment. DFAS-IN 37-1, tbl. 8-7.

D. Litigation.

1. General. As a general rule, the amount of liability expected to result from pending litigation shall be recorded as an obligation in cases where the government definitely is liable for the payment of money from available appropriations, and the pending litigation is for determining the amount of the government's liability. In other cases, an obligation shall not be recorded until the litigation has been concluded or the government's liability finally is determined. DOD FMR, vol. 3, ch. 8, para. 081203.

2. Settlement of a claim. Obligate funds using the same obligation rules that would be used for normal contracts. DOD FMR, vol. 3, ch. 8, para. 080304E; DFAS-IN 37-1, tbl. 8-6, para. 14.

3. Judgments or monetary awards. Initially, the government may pay judgments from a permanent appropriation called the Permanent Judgment Appropriation (Judgment Fund). 31 U.S.C. § 1304. The Contract Disputes Act (CDA) requires agencies to reimburse the Judgment Fund for CDA judgments. 41 U.S.C. § 612(c). Agencies make reimbursements from funds available for obligation when the judgment is entered. Expired funds that were current at the time of the judgment may also be used. DOD FMR, vol. 3, ch. 8, para. 080304F1; DFAS-IN 37-1, tbl. 8-6, para. 15; Bureau of Land Mgt. - Reimbursement of CDA Payments, B-211229, 63 Comp. Gen. 308 (1984).

4. Attorney fees and other expenses. These costs are not payable by the Judgment Fund. Record obligations against current funds at the time the awards are made by the deciding official or by the court. DFAS-IN 37-1, tbl. 8-6.

IX. CONCLUSION.

APPENDIX A

DISCUSSION PROBLEM NO. 1

You are the Contracts attorney at Fort Spackler, which is conducting a procurement for the maintenance of government vehicles. The contract will require the contractor to service and maintain approximately 250 government sedans, vans, and pickup trucks for one base year with four option years. Because of the volatility of oil and lubricant prices, the contracting officer plans to use a fixed price contract with economic price adjustment (EPA) clause. The EPA clause will cover increases (or decreases) in the cost of these items up to 10% of the contract price. The budget analyst in the Directorate of Resource Management, or DRM (the person responsible for certifying fund availability) calls you with the following questions:

1. What type of funds should be used for this procurement?

2. How much money should be committed for the base year for this procurement? Specifically, what kind of liability does the EPA clause represent? How much money should be committed to cover this liability?

3. What about the option periods?

DISCUSSION PROBLEM NO. 2

Having answered the DRM budget analyst's questions, you next field a call from the contracting officer. She is concerned because the DOL wants the contract to run from August 2005 through July 2006. Because FY 2005 O&M, Army funds will be used to fund the contract, the contracting officer is concerned that the contract will extend through ten months of FY 2006. What do you advise? Is there a Bona Fide Needs?

DISCUSSION PROBLEM NO. 3

Since you steered everyone in the right direction, efforts to compete and award the vehicle maintenance contract proceeded smoothly. Fort Spackler received four proposals that were evaluated for award, and the contracting officer has decided to eliminate Smails & Son, Inc. from the competitive range of offerors still eligible for contract award. On 15 July, Smails & Son, Inc. filed a protest with the GAO concerning its elimination from the competitive range. The GAO has 100 days to issue a decision. It is now 20 September and the contracting officer and budget analyst ask you whether they should de-commit the funds and use them elsewhere before they expire. What do you advise?

DISCUSSION PROBLEM NO. 4

Fort Spackler won the protest, and completed the evaluation and selection of a contractor for award. You now have the contract file for review prior to issuing notice of award. The file contains a PR&C citing $600,000 of FY 2006 O&M, Army funds. However, the proposed awardee's price is $650,000. What do you advise?

APPENDIX B

FUND DISTRIBUTION PROCESS